

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: WASHINGTON MUTUAL  
MORTGAGE BACKED SECURITIES  
LITIGATION,

This Document Relates to: ALL CASES

Master Case No. 2:09-cv-00037 MJP

**REPLY MEMORANDUM IN FURTHER  
SUPPORT OF PLAINTIFFS'  
EXPEDITED MOTION TO AMEND  
SCHEDULING ORDER**

**NOTED ON MOTION CALENDAR:  
December 16, 2011**

**ORAL ARGUMENT REQUESTED**

Reply Memorandum in Further Support of Plaintiffs'  
Expedited Motion to Amend Scheduling Order  
Case No. 2:09-cv-00037 MJP

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## I. INTRODUCTION

In opposing Plaintiffs' motion to amend the scheduling order, Defendants fail to address a number of facts raised by Plaintiffs, which clearly demonstrate good cause supporting their motion: (1) Plaintiffs have been more than diligent in pursuing, obtaining and reviewing the tens of millions of pages of documents produced by Defendants and JPMorgan Chase Bank N.A. ("JPMC"); (2) Plaintiffs were forced to wait many months to obtain the majority of emails and other important loan-related documents from Defendants and JPMC based on their statements concerning the purported difficulty in locating responsive documents; (3) Defendants, on the eve of the Court's deadline to complete production, engaged in a wholesale document "dump," producing over 400 boxes of hard-copy documents as well as 9,000 loan files and documents stored on computer media, many of which originated from the files of the individual defendants or other key former WaMu employees; and (4) Defendants continue to this very day to produce documents, including documents relating to loan put backs,<sup>1</sup> that are highly relevant to the issue of Defendants' failure to comply with their stated underwriting guidelines.

The only prejudice Defendants can point to stemming from the proposed amendment is that the time to file their summary judgment motions will be shortened. Such protestations of "prejudice" do not and cannot compare to the prejudice that Plaintiffs will suffer if they are not allowed to complete their review of the approximately 26 million documents and depose relevant witnesses.

### A. Good Cause Exists for the Modification of the Scheduling Order

As set forth in Plaintiffs' opening memorandum (ECF No. 351), the facts clearly establish that Plaintiffs have good cause to modify the Scheduling Order as they need to

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<sup>1</sup> See Declaration of Anne Box filed concurrently herewith ("Box Decl."), Ex. A (December 13, 2011 Letter from Matthew Jackson to Josh Devore).

1 complete their review of the documents and data in order to complete the remaining depositions.<sup>2</sup>  
 2 Plaintiffs have diligently pursued discovery in this action, which has resulted in the production of  
 3 over 26 million pages of documents. Plaintiffs have provided their clients for depositions, have  
 4 taken or defended 27 depositions of party and non-party witnesses and have subpoenaed over 70  
 5 third parties seeking information concerning the Certificates at issue.

6 Throughout the spring and summer, Defendants and JPMC delayed production of  
 7 substantive documents, specifically, email, and loan files. Just two days prior to the original  
 8 discovery cut-off, when Defendants notified Plaintiffs of their intent to seek a modification of the  
 9 production deadlines, Defendants were still in the process of identifying relevant sources of  
 10 information from Washington Mutual Capital Corporation's ("WCC") email server and shared  
 11 drive.<sup>3</sup>

12 Defendants have no response to these facts. Defendants' argument that an extension isn't  
 13 warranted because "Plaintiffs knew exactly what had been produced and the potential volume  
 14 and nature of the documents WCC and JPMC were set to produce"<sup>4</sup> is nonsensical as it  
 15 presupposes Plaintiffs had the clairvoyance to know what information was contained in the  
 16 documents and which witnesses to depose.

17 Defendants' mischaracterization of Plaintiffs' decision to not proceed with certain  
 18 depositions as a lack of diligence is contrary to the facts. Plaintiffs made the reasonable decision  
 19 not to depose certain witnesses prior to having received and reviewed relevant documents related  
 20 to those witnesses. Defendants were well aware that, during the October 3 call referenced by  
 21 Defendants in their brief in opposition,<sup>5</sup> Plaintiffs' production of a list of potential deponents was

22 <sup>2</sup> See *E.E.O.C. v. Bonneville Hot Springs, Inc.*, No. 07-CV-5321, 2008 WL 3891272 (W.D. Wash. Aug. 19,  
 23 2008); Wright, Miller & Kane, *FEDERAL PRACTICE & PROCEDURE* §1522.2 (3d ed. 2011).

24 <sup>3</sup> See Box Decl., Ex. B (July 28, 2011 email from John Pernick to Joseph Guglielmo and Josh Devore).

25 <sup>4</sup> Defendants' Opposition to Plaintiffs' Expedited Motion to Amend Scheduling Order, ECF No 254 ("Defs.'  
 Opp.") at 2.

<sup>5</sup> See Defs.' Opp. at 7, 12.

1 not an indication that Plaintiffs were, at that time, going to depose each witness listed, nor was it  
 2 an invitation to have Defendants *unilaterally* schedule the depositions as they saw fit to gain a  
 3 tactical advantage.<sup>6</sup> Thus, Defendants' complaint that they proposed deposition dates in October  
 4 only to have Plaintiffs cancel such dates is misleading and meritless.

5 Defendants have no real response to the fact that they and JPMC have produced over  
 6 14.6 million pages of documents *after* the date the Court originally set in July for their  
 7 productions to be complete. Indeed, only a few short months ago Defendants admitted to not  
 8 having searched through key data and document sets belonging to WCC custodians and thus  
 9 needing until August to review and produce such information.<sup>7</sup> And Defendants' contention that  
 10 Plaintiffs waited until only recently to review the 9,000 loan files made available in Monroe,  
 11 Louisiana,<sup>8</sup> ignores the fact that these files were not made available during the many months that  
 12 Defendants were supposed to have gathered and produced their documents. Indeed, a log of  
 13 such documents was not provided to Plaintiffs until October 26, 2011. *See* ECF No. 352-3. This  
 14 timing and the timing of the productions in San Francisco, well after the original July 29  
 15 production deadline (*see* ECF. No. 352-1), are clear examples of Defendants' dilatory tactics and  
 16 undermine Defendants' claim that they have "scrupulously complied with their discovery  
 17 obligations." *See* Defs' Opp. at 1.

18 Furthermore, Defendants and JPMC have withheld approximately 78,250 documents on  
 19 the basis of privilege. There should be no question that Plaintiffs are entitled to have time to  
 20 evaluate and, if necessary, challenge Defendants' and JPMC's respective assertions of privilege.  
 21 For example, thousands of documents relating to Defendant Careaga have been withheld as  
 22 privileged. Defendants and JPMC cannot refute the fact that privilege logs and reports from  
 23

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24 <sup>6</sup> *See* Box Decl., Ex. E (October 6, 2011 letter from Josh Devore to Michael Paskin and Daniel Slifkin).

25 <sup>7</sup> *See* Box Decl., Ex C. (July 12, 2011 email from John Pernick to Joseph Guglielmo).

<sup>8</sup> Defs.' Opp. at 8, n.1.

1 Defendants and JPMC were not produced until October 25, 2011 and October 26, 2011  
 2 respectively. *See* ECF Nos. 352-2 and 352-3. Plaintiffs have been diligent in examining  
 3 Defendants' and JPMC's privilege logs and addressing potential issues concerning the logs. If  
 4 necessary, Plaintiffs will move the Court to compel improperly withheld documents. For this  
 5 reason alone, additional time should be afforded Plaintiffs to properly determine what documents  
 6 on these massive privilege logs and reports should be produced.

7 With respect to the current deposition schedule, Defendants have acknowledged that the  
 8 parties are unable to meet the current deadlines and have offered an extension of approximately  
 9 24 days. *See* Defs.' Opp. at 12. Defendants fail to address Plaintiffs' argument that the  
 10 completion of at least 14 depositions, not including any depositions Defendants intend to take,  
 11 within the current deadline is highly prejudicial to Plaintiffs and would still require depositions  
 12 to occur almost daily.<sup>9</sup> Dates have not been proposed or agreed to for the following witnesses:  
 13 Cliff Rossi, David Schneider, Glenn Wakeman, Hugh Boyle,<sup>10</sup> Richard Careaga, and Steve  
 14 Rotella.

15 Moreover, Plaintiffs may depose additional individuals depending on what testimony is  
 16 obtained from the previously noticed witnesses. In opposing the continuance, Defendants make  
 17 the incredible argument that, "if Plaintiffs actually have a need to take these 'additional'  
 18 depositions, they could have identified and attempted to schedule them at a point much earlier in  
 19 the discovery process." *See* Defs.' Opp. at 10. However, as anyone involved in discovery  
 20 knows, in order to determine whether additional discovery and depositions are necessary, one

21 <sup>9</sup> Currently, the remaining schedule for depositions is as follows: December 21, 2011 – Mark Hillis; January  
 22 5, 2012 – Melissa Martinez; January 10, 2012 – Defendant Steven Fortunato, James Tiegen; January 13, 2012 –  
 23 Donald Wilhelm, Defendant Diane Novak and third party Jose B. Zamora; and January 18, 2012 – Defendant David  
 Beck.

24 <sup>10</sup> When Plaintiffs requested that Defendants accept service for Mr. Boyle's deposition, Defendants stated that  
 25 they could not locate him. However, Plaintiffs were able to locate Mr. Boyle as a current officer of a banking  
 institution located in Barbados. Once Plaintiffs contacted Mr. Boyle and informed him that they sought his  
 testimony, Mr. Boyle's attorney, in Seattle, contacted Plaintiffs stating that Plaintiffs needed to go through the  
 Hague Service Convention to serve him. Notably, Mr. Boyle is a U.S. resident with property in the Seattle area.

1 needs to first review the documents and then take initial depositions to confirm what, if any,  
 2 additional information needs to be discovered. Defendants' failure to make their 30(b)(6)  
 3 witness available to testify on behalf of WCC until September 14, 2011, along with not yet  
 4 having made a 30(b)(6) witness available to testify on behalf of Defendant Washington Mutual  
 5 Asset Acceptance Corporation, has delayed and impacted the scheduling of percipient witness.<sup>11</sup>

6 A continuance of the fact discovery cut-off of 76 days – until April 2, 2012, will allow  
 7 the parties time to complete the review of documents and related loan files and properly schedule  
 8 the remaining depositions of party and non-party witnesses. Given the circumstances, good  
 9 cause has clearly been met.

#### 10 **B. There Is No Prejudice to Defendants**

11 Defendants make no argument of substance that they will be prejudiced other than a  
 12 vague claim that they will have less time to spend on summary judgment briefing and motions *in*  
 13 *limine*. See Defs.' Opp. at 11-12. If Defendants believe that they have such "strong grounds" for  
 14 summary judgment as they state, there is nothing preventing Defendants from filing for summary  
 15 judgment now as the proposed schedule simply provides deadlines. Given that there is nothing  
 16 prohibiting Defendants from filing at any time, delaying the deadline to file summary judgment  
 17 motions is of no consequence. Moreover, the prejudice, if any, to Defendants is clearly  
 18 outweighed by the prejudice to Plaintiffs if they are not allowed sufficient time to complete  
 19 discovery. Given that Plaintiffs do not propose to amend the trial date, there is simply no  
 20 prejudice to allowing the parties to complete discovery.<sup>12</sup>

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24 <sup>11</sup> See Box Decl., Ex. D (December 12, 2011 letter to John Pernick, Eric Mattson and Michael Paskin).

25 <sup>12</sup> See *Lisker v. City of Los Angeles*, No. CV 09-09374, 2011 WL 3420665, at \*1 (C.D. Cal. Aug. 4, 2011) (citing 6A Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE §1522.2 (3d ed. 1990)).

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**II. CONCLUSION**

For the reasons set forth herein as well as in Plaintiffs' motion, Plaintiffs respectfully request that the Court grant Plaintiffs' motion and amend the discovery schedule.

DATED: December 16, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record and additional persons listed below:

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12 Dated December 16, 2011.

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